LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 10 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 301

ELMF J. DAY, *Petitioner,*

v.

NORTHWEST DIVISION 1055 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a labor union, and C. A. BANKHEAD, an individual,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENTS IN OPPOSITION

BERNARD CUSHMAN
5025 Wisconsin Avenue, N.W.
Washington, D. C.

ISAAC N. GRONER, of
COLE and GRONER
1730 K Street, N. W.
Washington, D. C.

PAUL T. BAILEY, of
BAILEY, SWINK, HAAS
and SEAGRAVES
617 Corbett Building
Portland, Oregon

Attorneys for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Question Presented	1
Statute Involved	3
Statement	3
Argument	7
I. This Case Has No General Importance	7
II. The Decision Below Is Obviously Correct	9
Conclusion	17

AUTHORITIES

CASES:

Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238 (1962) 14, 15

Day v. *Northwest Division 1055*, 78 Ore. Adv. 121, 389 P. 2d 42 (1964) 2, 4, 5, 7, 9, 11, 15

Fox v. *Knight*, 221 Ore. 1, 350 P. 2d 177 (1960) 14

Guss v. *Utah Labor Relations Board*, 353 U.S. 1 (1957) 12

Hattiesburg Unions v. *Broome Co.*, 377 U.S. 126 (1964) 10

Humphrey v. *Moore*, 375 U.S. 335 (1964) 12

Iron Workers v. *Perko*, 373 U.S. 701 (1963) 6, 8, 9, 12

International Union of Electrical, R. & M. Wkrs. v. *N.L.R.B.*, D.C. Cir., 1962, 307 F. 2d 679 11

Jacobsen v. *Luckenbach Steamship Co.*, D. Ore., 201 F. Supp. 883 (1961) 14

Liner v. *Jafco, Inc.*, 375 U.S. 301 (1964) 10

Lockridge v. *Amalgamated Association* 84 Idaho 201, 369 P. 2d 1006 (1962) 8

Machinists v. *Gonzales*, 356 U.S. 617 (1958) 15

N.L.R.B. v. *Technicolor Motion Pic. Corp.*, 9 Cir., 1957, 248 F. 2d 348 11

Plumbers' Union v. *Borden*, 373 U.S. 690 (1963) 6, 8, 9, 12, 15

Radio Officers v. *Labor Board*, 347 U.S. 17 (1954) 11

Page

Retail Clerks v. *Schermerhorn*, 375 U.S. 96 (1963) .. 9
Rice v. *Sioux City Cemetery*, 349 U.S. 70 (1955) ... 3, 9
Rudolph v. *United States*, 370 U.S. 269 (1962) 9
Smith v. *Abel*, 211 Ore. 571, 316 P. 2d 793 (1957) .. 13
Smith v. *Evening News Association*, 371 U.S. 195 (1962) 12, 13
Teamsters v. *Morton*, 377 U.S. 252 (1964) 12, 14
Teamsters Local v. *Lucas Flour Co.*, 369 U.S. 95 (1962) 15
Way v. *Patton*, 195 Ore. 36, 241 P. 2d 895 (1952) ... 14
Weaver v. *Austin*, 184 Ore. 586, 200 P. 2d 593 (1949) 13

STATUTES:

National Labor Relations Act, as amended, 29 U.S.C. §§ 151-168: 3, 5, 16
Section 7, 29 U.S.C. § 157 3
Section 8 (a) (3), 29 U.S.C. § 158 (a) (3) ... 3
Section 8 (b) (1), 29 U.S.C. § 158 (b) (1) ... 3, 5
Section 8 (b) (2), 29 U.S.C. § 158 (b) (2) .. 3, 5, 11
Section 9 (a), 29 U.S.C. § 159 (a) 14

Labor-Management Relations Act, Section 301, 29 U.S.C. § 185 ..... 6, 12, 14, 15
Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531: 6, 16
Section 101 (a) (5), 29 U.S.C. § 411 (a) (5) .. 16
Section 603 (a), 29 U.S.C. § 416 (a) 16

OTHER:

American Digest System, Labor Relations (West Publishing Co.) 11

Cumulative Digest and Index, Labor Relations Reference Manual (Bureau of National Affairs) 11

Labor Law Reporter (Commerce Clearing House) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 301

ELMER J. DAY, *Petitioner*,

v.

NORTHWEST DIVISION 1055 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a labor union, and C. A. BANKHEAD, an individual,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

A. The only question presented in this case and decided by the Court below is:

Can a State court, in an action under State law for tortious interference with employment, assert juris-

diction over union conduct so regulated by the Congress as to be certainly either an unfair labor practice or protected concerted activity—causing an employee's discharge, under a union security clause in a collective bargaining agreement, by advising the employer that the employee had become delinquent in his union dues payments?

B. The Question Presented stated in the Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon herein ("Pet." hereinafter) is not involved in this case, and was not presented to or decided by the Court below. While petitioner's Question is predicated on an action "against a labor union for wrongfully expelling him from the union," Pet. 2, the truth is, as the Court below held, that this is and was throughout an "action for tortious interference with his employment * * *." 78 Ore. Adv. at 122, 389 P.2d at 43, Pet. 22.[1] This case involves no issue of breach of contract or fiduciary obligation or Landrum-Griffin —the pleadings, the trial record and the majority decision below will be searched in vain for any such issues. See also pp. 12-17, *infra*. Accordingly, ex-

[1] Petitioner's reiterated references to "expulsion", Pet. 2, 7, 8, 10, 12, 15, reflect no more than his own rhetoric. As this case involves a "discharge" from employment, Pet. 3, 4, 9; 5, 7, 13, rather than and more than the "expulsion" from membership, petitioner misunderstands and repeatedly misstates the case. To take but one example; petitioner states that the Court below acted "on the mistaken premise that such *expulsion* was 'arguably' an unfair labor practice subject to the exclusive regulation of the National Labor Relations Board." Pet. 7 (emphasis added). The truth is that the Court below well understood that the case concerned interference with employment consequent upon expulsion from the Union, precisely the union conduct which is undeniably subject to the jurisdiction of the Board. See pp. 10-12, *infra*.

traordinary as it may be, this petition asks review by this Court of issues not presented in the case.[2]

STATUTE INVOLVED

The only pertinent statutory provisions are Sections 7, 8(a)(3), 8(b)(1), and 8(b)(2) of the National Labor Relations Act as amended, 49 Stat. 449, 61 Stat. 136, 73 Stat. 525 ("the Act" hereinafter), 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3), 158(b)(1), and 158(b)(2), which are set forth in Appendix A of the Petition. Pet. 17-19.

STATEMENT

Prior to November 1, 1959, the petitioner, Elmer J. Day, was employed as a bus driver by the Greyhound Corporation ("Greyhound" hereinafter) and had been by timely dues payments maintaining his membership in good standing in respondent labor union, Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America ("Union" hereinafter). Petitioner neglected to pay his October Union dues by November 1, however, as required by the International Constitution of the Union; and he thus both surrendered his membership in good standing in the Union and rendered himself liable to discharge from his employment.

The governing provision of the Constitution provided, "Where agreements with employing companies provide that members must be in continuous good

---

[2] Lurking in the petition may be questions which, "abstractly considered, * * * may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

financial standing, the member in arrears one month may be suspended from membership and removed from employment, in compliance with the terms of the agreement." Trial Exhibit ("Tr. Ex." hereinafter) 59. These are the "relevant provisions of the Union's Constitutional and General Laws" upon which respondents rely, not those referred to in the petition and the dissent below. See Pet. 11; 78 Ore. Adv. at 128, 389 P.2d at 46, Pet. 30. The Union had an agreement with Greyhound requiring the maintenance of Union membership as a condition of employment.[3]

Petitioner having surrendered his membership by failing to pay his October dues, the other respondent, C. A. Bankhead, the Financial Secretary of the Union, advised Greyhound that petitioner no longer satisfied the condition of employment relating to maintaining Union membership and was thus to be terminated in accordance with the collective bargaining agreement. On or about November 3, 1959, Greyhound discharged petitioner.

On November 12, 1959, petitioner filed a charge of unfair labor practice against the Union, alleging violation of §§ 8(b)(1) and (2) of the Act, with the ap-

---

[3] There is no dispute that the collective bargaining agreement in effect in November, 1959, required that all employees must remain members of the Union as a condition precedent to continued employment. The Court majority below did not quote from the collective bargaining agreement. See Pet. 11, n. 4. Its reading of the agreement was that "this contract required Day to remain a member of the union in good standing in order to retain his employment." 78 Ore. Adv. at 121, 389 P.2d at 43, Pet. 22.

Under the International Constitution Day was thus obligated to have paid his October dues by November 1; petitioner's assertion to the contrary, Pet. 12, disregards both the collective bargaining agreement and the reference in the International Constitution to that agreement.

propriate Regional Office of the National Labor Relations Board ("the Board" hereinafter). The specific charge was: "The above labor organization successfully and unlawfully demanded my discharge by the employer named below for the reason of delinquency in dues."[4]

On December 15, 1959, petitioner was advised by the Regional Director of the Board that his charge had been investigated, and that there was insufficient evidence of any violation under the Act.[5] Although petitioner was also advised that he had a right of appeal to the General Counsel of the Board, he never appealed. Accordingly, the Board determination of no violation became final.

On November 30, 1959, petitioner filed his original complaint, and in 1960 and 1961 amended complaints, in the Circuit Court for the State of Oregon for the County of Multnomah, against the present respondents and others—originally including, but thereafter eliminating Greyhound—alleging a conspiracy unlawfully to demand petitioner's discharge from Greyhound for the reason of delinquency in dues. The only relief demanded was damages, both special and punitive; petitioner did not seek reinstatement to Union membership. All the damages alleged flowed from the loss of his *employment* with Greyhound and the loss of *employment* opportunities in the field of bus driving.[6]

---

[4] Tr. Ex. 55, 78 Ore. Adv. at 126, 389 P.2d at 45, Pet. 27 (dissenting opinion).

[5] Tr. Ex. 54, 78 Ore. Adv. at 126-127, 389 P.2d at 45-46, Pet. 28-29 (dissenting opinion).

[6] The recital of damages at Pet. 9 confirms that all damages claimed flowed from the loss of employment and employment opportunities "in his chosen vocation."

None of the complaints alleged any violation of the collective bargaining agreement. None purported to be based upon Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 ("Section 301" hereinafter). None purported to be based upon any provision of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531, or, indeed, on any provision of Federal law. The suit was based and tried solely upon the basis of State law.

Respondents duly raised and preserved the defenses that the subject matter of the action had been preempted by the Congress in the Act; that petitioner had not exhausted his internal remedies under the Union laws; and also that he had not availed himself of the collective bargaining contractual remedies of grievance procedure and arbitration.

On February 9, 1962, the jury, upon the trial, returned a verdict against respondents in the amount of $50,000.00 in general damages and $20,000.00 in punitive damages. In response to a special interrogatory submitted by the Court, the jury found that there was a conspiracy by respondents as charged.

On the appeal, while respondents preserved all their contentions establishing that the verdict should be reversed, the Supreme Court of Oregon considered only the issue of preemption, and decided, with two dissenting votes, that the State had no jurisdiction. The Court relied squarely upon *Plumbers' Union* v. *Borden*, 373 U.S. 690 (1963) ("*Borden*" hereinafter) and *Iron Workers* v. *Perko*, 373 U.S. 701 (1963) ("*Perko*" hereinafter) as definitively holding that a State court can assert no jurisdiction over union conduct "arguably" or "reasonably" subject under the

Act to the jurisdiction of the Board. And the Court held that the Act provides that:

> "* * * a union may lawfully require an employer to discharge an employee for a failure to maintain good standing in the union, when the union contract permits it, as in the instant case. * * * But, if the discharge for failure to pay dues was used as a subterfuge to hide some other improper motive, as in the instant case, the union, at least, has been guilty of an unfair labor practice and the National Labor Relations Board will, presumably, protect the workman's rights. *The cases leave no doubt that the decision as to the true nature of the discharge is within the cognizance of the Board.*" 78 Ore. Adv. at 123, 124, 389 P.2d at 44, Pet. 24-25 (emphasis added).

ARGUMENT

There is no reason for granting this petition. Petitioner does not claim that his case raises issues of general importance. Furthermore, the decision below is so plainly in accord with principles of law enunciated by this Court as to warrant no further consideration by this Court.

I

This Case Has No General Importance

Petitioner fails to show any general importance in this case. Indeed, petitioner tenders no more than the bare assertion that "This case affords this Court the occasion to clarify current misunderstandings" with respect to labor law. Pet. 6-7. Petitioner makes no attempt to specify precisely what the misunderstandings are; nor does he explain how the alleged misunderstandings have been displayed—except that he be-

lieves the decision below to be in error. In fact, this petition in its entirety is no more than a re-argument (after the denial of a petition for rehearing below; Pet. 46) that the decision of the Court below was in error.

Stretching the assertions in the petition to their furthermost point, there is presented here only a case where a State court, applying decisions of this Court to a particular record, has determined that State jurisdiction is precluded because the matter is clearly within the cognizance of the Board. Review of the decision below on its merits would turn on the wording and effect of this particular complaint, and the facts of this particular record including the wording and practice under this particular collective bargaining agreement (which has since expired) and these particular Union laws (which have since been amended). None of this presents the faintest glimmer of a question of general importance which would justify the attention of this Court.[7]

---

[7] The lack of any claimed conflict of decision emphasizes the lack of general importance in this case. It may be appropriate to note that another Greyhound bus driver was discharged at this time at the instance of the Union for the identical reason. He also filed suit under State law, as a resident of Idaho, in the District Court of the Third Judicial District of Idaho. There the trial court upheld a motion to dismiss on the ground of preemption; but the Supreme Court of Idaho reversed, saying it found the Federal law as it then stood unclear. *Lockridge* v. *Amalgamated Association*, 84 Idaho 201, 369 P.2d 1006 (1962). This was decided prior to the decisions of this Court in *Borden* and *Perko*. It may well be that petitioner made no mention of *Lockridge* precisely because *Borden* and *Perko* so clearly resolve any issue mustered by the Supreme Court of Idaho in *Lockridge*. The *Lockridge* case has not yet been called for trial. There is no reason to anticipate that on any appeal the decision of the Supreme Court of Idaho would fall out of step with *Borden*, *Perko* and the decision below.

II

The Decision Below Is Obviously Correct

The entire thrust of the petition is that this case was wrongly decided below and that the judgment below should now be reversed for the benefit of petitioner. The short answer is that even if this particular decision were in error, "this Court does not sit * * * for the benefit of particular litigants." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Whenever "review would be of no importance save to the litigants themselves" the writ of certiorari should not be granted. *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962).

Moreover, far from being wrong, the decision below is obviously correct. It is firmly based upon principles clearly and repeatedly enunciated by this Court. This Court has recognized different types of cases raising preemption issues, and there can be no doubt that the Court below accurately analyzed and categorized this case in accordance with the rulings and standards of this Court.

1. The legal principle which the Court below held decisive, relying primarily upon *Borden* and *Perko*, is that a State court lacks jurisdiction over union conduct which is arguably subject to the jurisdiction of the Board—arguably either an unfair labor practice or protected concerted activity under the Act. This principle is surely established beyond any possible confusion or misstatement.[8]

---

[8] As the Court below pointed out, the rule of *Borden* and *Perko* has been expressly reaffirmed by this Court in *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 105 (1963), this Court stating: "We held in *Plumbers' Union* v. *Borden*, 373 U.S. 690, and in *Iron Workers* v. *Perko*, 373 U.S. 701, that *Garmon* pre-empted the field

Petitioner does not challenge this principle so much as question its application. His entire position rests upon the contention that the Union conduct at bar cannot be considered an unfair labor practice or within the jurisdiction of the Board. That contention is completely refuted by scores of pertinent decisions, none of which petitioner mentions, and by the provisions of the Act which they interpret and apply.

The Union conduct for which petitioner sought damages was that the Union caused his discharge under the collective bargaining agreement by advising his employer that he had become delinquent in his Union dues payments; and petitioner asserted that he was not delinquent in fact and that others in identical status were not discharged at Union request. If petitioner is correct, this would constitute a discriminatory discharge.

Charges of discriminatory discharge are filed with the Board every day, just such a charge as petitioner filed against respondents. Over and over and over again, the National Labor Relations Board, and the Federal courts in reviewing the decisions of the Board, have considered and decided under the Act the precise issue which the trial Court in Oregon has presumed to decide here—the basis in fact of a discharge induced by a union's assertion, under a valid union security clause, that an employee had lost his good standing

---

where employees were suing unions for damages arising out of practices that arguably were unfair labor practices subject to regulation by the National Labor Relations Board • • •." 78 Ore. Adv. at 124, 389 P.2d at 44, Pet. 25-26. Even more recently, this Court has held that "Congress has invested the National Labor Relations Board with the exclusive power to adjudicate conduct arguably protected or prohibited by the National Labor Relations Act." *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 (1964); *Hattiesburg Unions* v. *Broome Co.*, 377 U.S. 126 (1964).

with the union because of delinquency in dues payments.[9] These cases do not lose their force and vitality merely because petitioner has elected not to mention them. These cases provide ineradicable proof that this union conduct is within the jurisdiction of the Board.

The plain fact is that Section 8(b)(2) of the Act makes all discriminatory discharges caused by a labor union unfair labor practices—with the single exception of any discharge in good faith compliance with the requirements for union membership and dues payments pursuant to a union security clause in a collective bargaining agreement.

Whenever the discharge is in fact for the asserted ground of union dues delinquency, the union activity is protected under the Act; whenever that asserted ground is invalid legally or is not the true reason factually for the union's requesting the discharge, the union's conduct is discriminatory under the Act and is prohibited as an unfair labor practice. The provisions of the Act, and the administrative and judicial decisions under the Act, permit no doubt whatever that

---

[9] *Radio Officers* v. *Labor Board*, 347 U.S. 17 (1954) is the leading case. The Court below cited *N.L.R.B.* v. *Technicolor Motion Pic. Corp.*, 9th Cir. 1957, 248 F.2d 348, and *International Union of Electrical, R. & M. Wkrs.* v. *N.L.R.B.*, D.C. Cir. 1962, 307 F.2d 679, 78 Ore. Adv. at 123, 389 P.2d at 44, Pet. 24. For a complete catalog of the cases, see, e.g., American Digest System, Labor Relations, Key Numbers 368, 395 (West Publishing Co.); Cumulative Digest and Index, LRRM, §§ 59.230-59.231 (Bureau of National Affairs); Labor Law Reporter Par. 4525 (Commerce Clearing House).

All these cases involve collective bargaining agreements, the expulsion of a member from his union, direct labor management relations, and the encouragement of dues payments requisite to union membership. *Cf.* Pet. 12-13. These cases reduce petitioner's assertions that the Board lacks jurisdiction to the vacuum of *ipse dixit*.

this case involves union conduct "arguably" and "reasonably" subject to Board jurisdiction.

The Court below was plainly correct in deciding that there could be no assertion of State jurisdiction. The judgment below cannot be in error if *Borden* and *Perko* are binding law. This case is blanketed by *Borden* and *Perko*.

2. Even if the union conduct might be judged as neither arguably protected nor arguably prohibited "it is still necessary to determine whether * * * 'Congress occupied this field and closed it to state regulation.' *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 457." *Teamsters* v. *Morton*, 377 U.S. 252, 258 (1964); *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 6 (1957). *A fortiori*, this rule applies if Congress has so occupied the particular field of union conduct that it must necessarily be either an unfair labor practice or lawful concerted activity. The union conduct here has been thus regulated by the Congress, as we have seen; and the Supremacy Clause accordingly bars any assertion of State jurisdiction.

3. An action based upon Section 301 for violation of a collective bargaining contract has concurrent Federal and State jurisdiction. *Humphrey* v. *Moore*, 375 U.S. 335 (1964)[10]; *Smith* v. *Evening News Association*,

[10] In *Humphrey* v. *Moore*, the procedures provided in the collective bargaining agreement had been invoked and exhausted: The plaintiff's claim was that the contractual "Joint Committee exceeded its power [under the collective bargaining agreement] in making the decision it did," and for this reason, "the settlement is said to be a nullity and his impending discharge a breach of contract." 375 U.S. at 342. Further, plaintiff made allegations which charged "a breach of duty by the union in the process of settling the grievances at issue under the collective bargaining agreement." *Id.* at 343. Such a case has no relationship to this

371 U.S. 195 (1962).[11] In deciding that this was not such an action, the Court below was clearly correct.

The plain truth—undenied and undiscussed in the petition—is that this case was pleaded and tried exclusively on a tort theory.[12] Further, there appears to be no conceivable collective bargaining contract violation petitioner could have alleged as a basis for suit: The employer, who was not a defendant and not charged with being a participant in the alleged tortious conspiracy, did no more, upon being notified by the Union that petitioner was delinquent in his dues, than

---

case where petitioner made no effort to avail himself of the contractual grievance and arbitration procedure, or to request the Union to invoke the contractual procedures. Here, too, petitioner raises no question—and none can be raised—about the contractual power of the Union to request a discharge when it took the position an employee had become delinquent in his dues payments, or the contractual power of Greyhound to discharge him upon such advice from the Union.

[11] *Smith* v. *Evening News Association* was a suit which expressly in form and clearly in substance alleged a violation by the employer of a contract provision precluding discrimination against union members, in that the employer paid nonunion employees but did not pay union employees, during a strike. How this context can be analogized to that at bar is unexplained in the petition.

In any event, this Court was careful to note, "There was no grievance arbitration procedure in this contract which had to be exhausted before recourse could be had to the courts. Compare *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238; *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers*, 370 U.S. 254." 371 U.S. at 196, n. 1. In the instant case, there was such a procedure. Petitioner did not even attempt to utilize it. He is thus precluded from any court action on the collective bargaining contract.

[12] Petitioner has not established that in Oregon punitive damages may be awarded in contract actions. *Cf. Smith* v. *Abel*, 211 Ore. 571, 595, 316 P.2d 793, 804 (1957); *Weaver* v. *Austin*, 184 Ore. 586, 200 P.2d 593 (1949).

act—in petitioner's own words—"on the basis that it was complying with its specific contractual obligation with the Union to terminate the employment of persons who were no longer union members." Pet. 13. In addition, the contract contains a grievance and arbitration procedure which petitioner admittedly did not attempt to invoke. As petitioner neither requested the union to file a grievance on his behalf nor himself presented any grievance to his employer,[13] he has not satisfied an apparent condition precedent to litigation,[14] and there is no foundation for his assertions that this may be considered an action for violation of the collective bargaining agreement or involving the duty of the Union to represent him fairly.

In any event, petitioner's position would not be at all advanced even if this were considered to be a Section 301 action. His position requires that the governing law be State law. But it is unmistakably clear that Federal law governs in Section 301 actions, whether tried in State or Federal courts. *Teamsters* v. *Morton, supra; Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238

---

[13] Section 9(a) of the Act contains a proviso "That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment." 29 U.S.C. § 159(a).

[14] See footnote 11, *supra*. Moreover, under the State law of Oregon—the law upon which petitioner is relying—the exhaustion of internal union and collective bargaining contract remedies must be pleaded and proved. *Fox* v. *Knight*, 221 Ore. 1, 350 P.2d 177 (1960); *Way* v. *Patton*, 195 Ore. 36, 241 P.2d 895 (1952); *Jacobsen v. Luckenbach Steamship Co.*, D. Ore., 201 F. Supp. 883, 889 (1961).

(1962)[15]; *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). And the applicable Federal law, as indicated above, permits as lawful concerted activity discharges under a union security clause for allegedly delinquent union dues, unless the Board shall find them to be unfair labor practices under the Act. The Federal law dispositive of this case is the judgment of the Board that petitioner had not proved any violation of law; the necessary corollary is that the Board found the union conduct to be protected, lawful concerted activity under the Act. As even the dissenting opinion below found, "all of the evidence offered in this case was available at the time the complaint was filed" with the Board. 78 Ore. Adv. at 126, 389 P.2d at 46, Pet. 28-29. This Board determination is the Federal law of the case; and the Court below was quite correct in honoring it. Even if this could be considered a Section 301 case, therefore, the judgment below is correct.

4. State jurisdiction may be exercised if an action (as in *Machinists* v. *Gonzales*, 356 U.S. 617 (1958)) "was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment and * * * the principal relief sought was restoration of the union membership rights." *Borden*, 373 U.S. at 697. In this case, however, the action was focused on the employment relationship—the sole relief sought was damages measured exclusively by and flowing directly from the loss of employment and employment

[15] *Atkinson* v. *Sinclair Refining Co.* also holds that individual officers and members cannot be held liable in damages for union contract breaches. 370 U.S. at 247-249. This additional principle of Federal law precludes any recovery on petitioner's theory against respondent Bankhead.

opportunities. Petitioner made no request whatever for reinstatement to Union membership. Accordingly, the Court below was clearly correct in judging that the case could not possibly be considered as falling in this category.[16]

In apparent recognition of the deficiencies of his contention that State jurisdiction should not be preempted here under the National Labor Relations Act, petitioner seeks haven in the Labor-Management Reporting and Disclosure Act of 1959. But his resort to this statute fails on both procedural and substantive grounds. Procedurally, no such issues can be raised in this Court as none were decided by the Court below, nor presented to it prior to the petition for rehearing, which was denied without discussion. Substantively, the provisions cited by petitioner, Pet. 15, are clearly inapplicable. Section 101(a)(5), which establishes certain procedural safeguards against improper disciplinary action by a union against a member, expressly excludes suspensions and expulsions "for nonpayment of dues"; and nonpayment of dues was the one and the only basis on which petitioner rendered himself liable to expulsion and was in fact expelled from membership in the Union.[17] And Section 603(a), which pre-

[16] Indicative of the extremity of petitioner's argument is the glaring inconsistency in his asserting that his particular case should be held within both this category, from which "matters of employment" must be excluded, and also the category of Section 301 cases, which necessarily include and involve "matters of employment" as covered in collective bargaining contracts.

[17] If petitioner would now obtain the procedural relief within the Union embraced by the statute, the substantive issue would still be whether in objective fact—regardless of the subjective motivations of respondent Bankhead—his dues were paid up to date under the Union Constitution. See pp. 3-4, *supra*. If respondent Bankhead betrayed his union trust, there were internal Union remedies which were available to petitioner, but he failed to invoke them.

serves remedies otherwise available, is irrelevant here because there was no State remedy otherwise available in the light of the Congressional preemption of this field of union conduct.

There is no legal basis upon which the Court below could have asserted jurisdiction. Congress has regulated the union conduct complained of here expressly and comprehensively. This Union conduct is not merely arguably, but is necessarily, either an unfair labor practice or protected concerted activity under the Act. Congress has precluded State jurisdiction and established jurisdiction over this particular union conduct in the Board. Indeed, petitioner himself recognized this when he first presented his claim to the Board, which disposed of it finally. The Supreme Court of the State of Oregon had no Constitutional alternative to foreclosing the State courts from asserting jurisdiction over this Union conduct.

CONCLUSION

Since the Court below has disposed of this litigation in accordance with the decisions of this Court, there is no warrant for further review of the case by this Court. This case presents neither issues of general importance nor conflict with the decisions of this Court or any other court. This case is confined to its own particular facts.

For the reasons stated herein, respondents respectfully pray that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

BERNARD CUSHMAN
5025 Wisconsin Avenue, N.W.
Washington, D. C.

ISAAC N. GRONER, of
COLE and GRONER
1730 K Street, N. W.
Washington, D. C.

PAUL T. BAILEY, of
BAILEY, SWINK, HAAS
and SEAGRAVES
617 Corbett Building
Portland, Oregon

Attorneys for Respondents

September, 1964